PREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
226

BERNARD V. SUSSMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bernard V. Sussman prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the District of Maryland entered upon the verdict of a jury.

Opinion Below

The opinion of the Court of Appeals is reported as United States of America, Appellee, versus Bernard V. Sussman, Appellant, ... F. 2d ....., and is printed as Appendix A hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Was Petitioner denied due process under the Fifth Amendment, and denied the right to a jury trial under the Sixth Amendment by the application of irrational and arbitrary presumptions forming part of 21 U.S.C. §174 which provides that Petitioner's mere possession of opium is deemed sufficient evidence that the opium was illegally imported into the United States, and that the Petitioner knew it was illegally imported into the United States?

2. Was Petitioner denied his Fifth Amendment right not to plead guilty and his Sixth Amendment right to a trial by jury because, due to the pressure of the presumptions in 21 U.S.C. §174, and the severity of the penalty in 26 U.S.C. §7237(d), he was encouraged to plead guilty to other less severe charges or, as in this case, be penalized by his decision to contest the charge before the Court and jury?

3. Was the opium found by narcotics agents on an interior, common stairway at the premises where Petitioner's apartment was located beyond the scope of an otherwise valid search warrant and, therefore, improperly admitted into evidence?

Constitutional and Statutory Provisions Involved

This case involves important questions of criminal law under the Fourth, Fifth and Sixth Amendments of the Constitution of the United States, printed in Appendix C hereto, and 21 U.S.C. §174 and 26 U.S.C. §7237(d), printed as Appendix B hereto.

Statement of the Case

On August 23, 1967, agents of the Federal Bureau of Drug Abuse entered a two-story residence at 4909 Poe Avenue in Baltimore, Maryland, consisting of a basement, a first floor on which the Petitioner, Bernard V. Sussman, had an apartment, and a second floor. The agents were armed with a search warrant, issued the same day by a United States Commissioner, which upon reciting that opium and other illicit drugs were being concealed on "specifically the first floor and basement", authorized a search. Petitioner was arrested in the basement. Shortly thereafter, the agents found outside the door to Petitioner's apartment on a common stairway leading up to the second floor, a paper bag containing raw opium.

Subsequently a five-count indictment was returned charging Petitioner, in the first count, with the offense under 21 U.S.C. §174 here in issue and, in the remaining counts, with offenses under 26 U.S.C. §4704(a). However, on the second day of trial the Government dismissed all counts of the indictment except the first which reads:

> That on or about the 23rd day of August, 1967, in the State and District of Maryland, Bernard Sussman received, concealed, bought and sold, and facilitated the transportation, concealment and sale of a narcotic drug, that is, 141 grams of opium after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law.

In the Government's opening statement and arguments, in the testimony it produced, in its opposition to the defendant's motions for acquittal, and in its requests for instructions the prosecution relied exclusively upon the statutory presumptions contained in §174. The Court, in de-

livering its instructions to the jury at the close of the case expressly directed the jury that it was authorized to convict under the statute if it believed beyond a reasonable doubt that Petitioner had been in possession of the opium. The jury found Petitioner guilty. Subsequently, the Court overruled Petitioner's motion for new trial, and on August 7, 1968, sentenced Petitioner, as required by 21 U.S.C. §174 and 28 U.S.C. §7237(d) to five years imprisonment. The basic law relative to parole under 18 U.S.C. §4202 is not available to Petitioner.

Petitioner took an appeal to the United States Court of Appeals for the Fourth Circuit which affirmed the conviction in a *per curiam* opinion handed down on April 14, 1968.

Reasons for Granting the Writ

I.

Section 174 of 21 U.S.C. poses three essential elements: possession of narcotics, illegal importation of the same, and knowledge of that illegal importation. The Government only proved possession in this case, and then relied on the statutory presumptions of §174 to establish the remaining two elements. The Court of Appeals upheld the use of the inferences as not being arbitrary and unreasonable and therefore not violative of due process, and cited as authority for this proposition, *Yee Hem v. United States*, 268 U.S. 178 (1925). However, on May 19, 1969, the United States Supreme Court decided *Leary v. United States*, U.S. (1969) (37 L.W. 4397) which held, *inter alia*, that an almost identical statute (21 U.S.C. §176a) violated due process in creating arbitrary and irrational inferences. The decision in *Leary* carefully refused to express any opinion as to the continued validity of the presumption raised in §174. However, the present case raises exactly that important question of federal law which has not since

Leary, been decided by the Supreme Court, but should be decided.

Besides creating arbitrary inferences, §174 also violates due process and concomitantly the right to jury trial by altering the classic due process burden on the Government of proving Petitioner's guilt beyond a reasonable doubt. To charge the jury, as the trial court did, that the jury was authorized to return a guilty verdict based on unexplained possession of opium, while at the same time restating that the burden was on the Government to prove Petitioner's guilt on all elements beyond a reasonable doubt, is in practical effect to tell the jury at least on the gravamen of the offense — illegal importation and knowledge of the same — the burden of proof is actually less. *United States v. Adams*, 293 F. Supp. 776 (S.D. N.Y. 1968).

In *Leary v. United States*, this question was not reached, because the presumptions under §176a on marijuana were held to be arbitrary and irrational; but in this case, should the presumptions of §174 on a "hard" narcotic like opium not be deemed "arbitrary", there is raised an important question of federal and constitutional law which has not been but should be, decided by the Supreme Court.

II.

The chances of conviction are increased by the inferences that §174 permit to be drawn. See, *Leary v. United States*. Moreover, when ease of conviction is coupled with the severity of mandatory sentencing and ineligibility for probation or parole under 26 U.S.C. §7237(d), the pressure is compelling upon Petitioner to plea bargain for a conviction on a less severe charge. The operation of this compulsion thereby curtails not only the Petitioner's Fifth Amendment right not to plead guilty, but also his Sixth Amendment right to test the question of his guilt or innocence under

§174 before a jury. A compulsion of similar order has been held to be unconstitutional by the Supreme Court. *Jackson v. United States*, 390 U.S. 570 (1968). Consequently, whether or not compulsion under 21 U.S.C. §174 and 26 U.S.C. §7237(d) is unconstitutional presents an important question of federal and constitutional law which has not been, but should be, decided by the Supreme Court.

III.

The search warrant issued by the United States Commissioner limited the scope of the authorized search to the basement and first floor of the building. However, the Federal Agents expanded their search to include the stairway leading to the second floor on which the opium was found. This search was not conducted incident to the arrest of Petitioner. Consequently, the seizure of the opium was in violation of the Fourth Amendment and should have been excluded as evidence in the case. See, *Weeks v. United States*, 232 U.S. 383 (1914). The Court of Appeals' affirmation of its admission is contrary to decisions of the Supreme Court.

Conclusion

For the foregoing reasons, it is earnestly submitted that a writ of certiorari should issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM J. EVANS,
L. KEITH SIMMER, JR.,
Attorneys for Petitioner.

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

United States Court of Appeals
For The Fourth Circuit

No. 12,733

United States of America,
Appellee,

versus

Bernard V. Sussman,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Frank A. Kaufman, District Judge.

(Argued April 8, 1969. Decided April 14, 1969)

Before HAYNSWORTH, Chief Judge, SOBELOFF, and BUTZNER, Circuit Judges.

Charles Philip Brown for appellant; Nevett Steele, Jr., Assistant United States Attorney, (Stephen H. Sachs, United States Attorney, on brief) for appellee.

PER CURIAM:

Bernard Sussman was convicted of receiving illegally imported gum opium in violation of 21 U.S.C. § 174. This statute provides:

> "Whoever fraudulently or knowingly imports . . . any narcotic drug into the United States . . . contrary to law, or receives . . . any such narcotic drug after being imported . . . knowing the same to have been imported . . . into the United States contrary to law . . . shall be imprisoned. . . .

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Sussman contends he was denied due process of law because the statute permits the presumption of illegal importation of the drug and knowledge of such importation from mere possession. The presumption, however, has a rational basis. Importation of crude opium is prohibited unless allowed by the Commissioner of Narcotics, 21 U.S.C. § 173, and a government witness testified that poppies which are the source of opium are not grown in the United States. The inferences allowed by the statute are not so unreasonable or arbitrary as to constitute a denial of due process. *Yee Hem v. United States*, 268 U.S. 178 (1925). Nor does the statutory shift in the burden of going forward with the evidence infringe the Fifth Amendment's protection against self-incrimination. *United States v. Turner*, 404 F. 2d 782 (3d Cir. 1968).

Sussman also asserts that the district judge erred by admitting into evidence gum opium found in a paper bag on an interior stairway a few feet from the door of his apartment. We find no error. The seizure was legal because the search was authorized by a valid search warrant and also because it was incident to a lawful arrest.

Affirmed.

APPENDIX B

STATUTES

Title 21, U.S.C. §174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or re-

ceives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, U.S.C., §7237

(d) Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply.

APPENDIX C

AMENDMENTS TO UNITED STATES CONSTITUTION

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.